

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED NOV 22 1938
IN THE

Joseph W. Stewart
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 7182.

302

JOHN P. MULLEN, PETITIONER,

v.

AUSTIN F. CANFIELD, ET AL., RESPONDENTS.

On Writ of Error to the Police Court of
the District of Columbia.

WILLIAM E. LEAHY,
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Attorneys for Petitioner.

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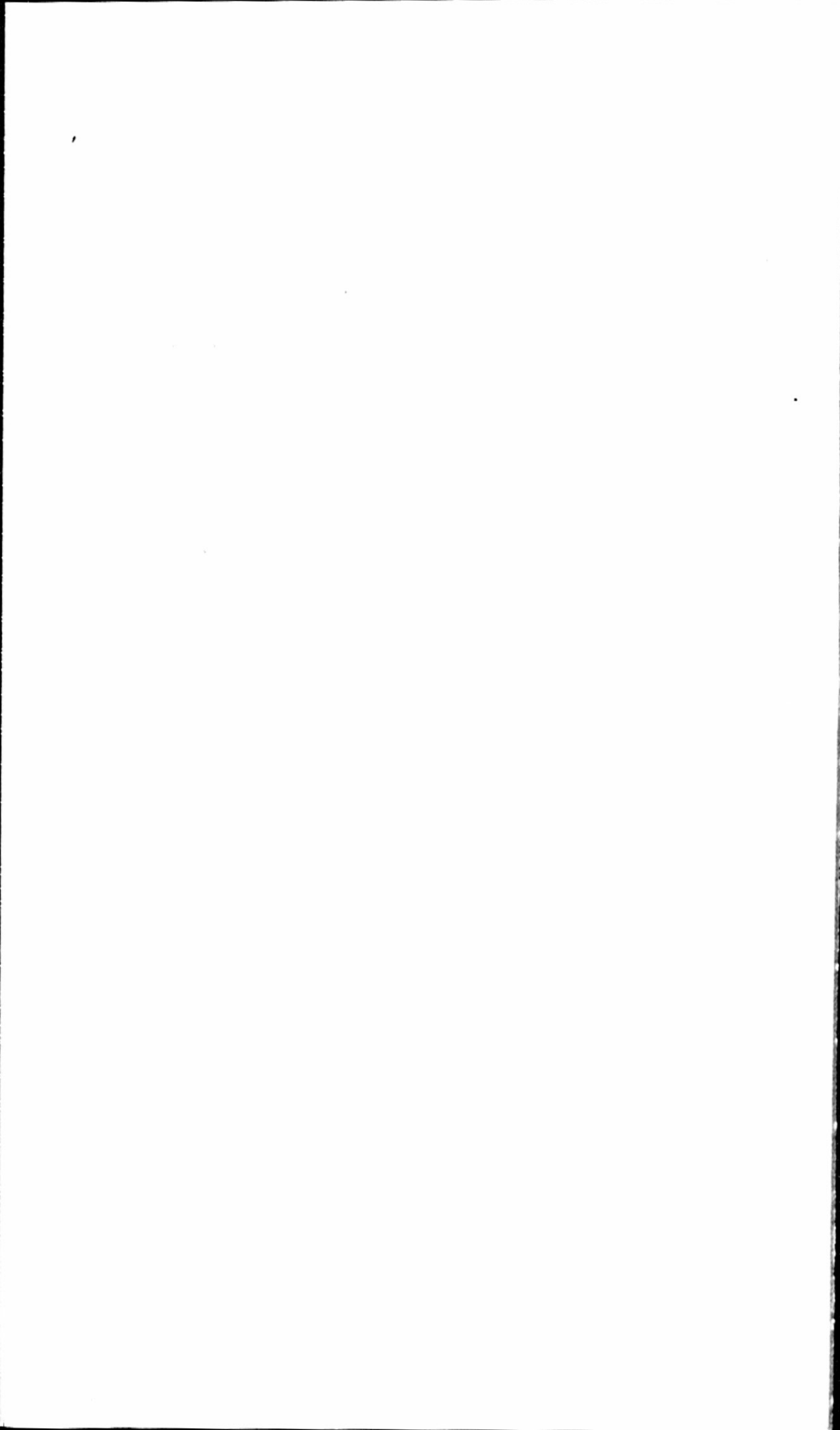
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 7182.

JOHN P. MULLEN, *Petitioner*,
v.
AUSTIN F. CANFIELD, *et al.*, *Respondents*.

ON WRIT OF ERROR TO THE POLICE COURT
OF THE DISTRICT OF COLUMBIA.

BRIEF OF PETITIONER.

FACTS.

Petitioner, John P. Mullen, a member of the Bar of this Court, and the District Court of the United States for the District of Columbia since 1916, was on the 29th day of January, 1938, suspended by the Police Court of the District of Columbia, for a period of six months from practicing as an attorney or counselor of that Court, for the reason that he solicited a client.

As indicated by the petition for rule to show cause issued by the Court below, one Hans Otto Stasch was arrested by a member of the Metropolitan Police Department on Saturday, June 26, 1937. The prisoner was charged with operating an automobile while under

the influence of intoxicating liquor and two minor infractions of the traffic law. Stasch remained in the custody of the Police Department from Saturday until Monday when he was transferred to the custody of the proper officials of the Police Court, for trial on the aforesaid charges.

The rule to show cause alleged that the respondent Mullen solicited and requested Stasch to retain him in the matter of the defense of the charges. The petition for the rule alleged that Mullen advised Stasch that he was an expert in such matters and had eighteen years experience. The rule further alleges that the respondent Mullen advised the defendant, while in custody, that he would arrange bail provided Stasch could pay the necessary premium therefor. It further alleges that Mullen arranged for the services of one Mendelson as a bondsman for the defendant Stasch. Further allegations were to the effect that the respondent Mullen sought and received fees from Stasch for the purpose of paying the premium on the aforesaid bond. After hearing testimony which will be hereinafter set out, the Court below, on the 29th day of January, 1938, found that the respondent Mullen was guilty of making solicitations to one Hans Otto Stasch in order that the said Mullen be retained as attorney and found that Mullen procured his retainment as an attorney by the said Stasch in the manner charged by the committee and that the respondent Mullen was guilty of professional misconduct. All other charges against the said Mullen were dismissed.

The testimony of Officer Norman S. Jones disclosed that on June 26, 1937, he arrested Hans Otto Stasch. He was brought into court and the officer prepared three informations against Stasch, the first of which charged driving while under the influence of liquor, the second,

operating an automobile without a permit, and the third, failing to exhibit a permit. The witness stated that his lawyer (Mullen) requested a trial by jury on the driving while intoxicated charge. It was later proved that Stasch had an operator's permit. That charge was nolle prossed. The officer stated that eventually Stasch pleaded guilty to the driving while intoxicated charge and a fine of \$150.00, or, in default thereof, a sentence of ninety days in jail was imposed by the Court, but Stasch was allowed time to raise the money. The witness did not know whether the fine had been paid or not. On cross-examination the witness testified that he had arrested Stasch as a result of a radio call that an accident had occurred. Investigation indicated that Stasch was involved in the accident. The occurrence took place about noon on Saturday, June 26, 1937. At that time some one else was in the car with Stasch but he ran from the scene as fast as he could and was not apprehended. The officer arrested Stasch for being drunk. On cross-examination the officer testified that Stasch was quite drunk and was unable to talk coherently and unable to walk without staggering and in general was in pretty bad shape. The police wagon was called in order to take him to the precinct (R. 3). The witness further testified that when Stasch was finally brought into court it was proved that he had a permit. The officer testified that at the time of his arrest Stasch could not show him a permit and was not in any condition to tell him whether he had a permit or not (R. 3).

Mr. O'Day, an assistant corporation counsel, testified that on June 28, 1937, upon statements made to him by the witnesses, he directed that the defendant Stasch be charged with driving while intoxicated and failure to have an operator's permit, which charges were filed in court (R. 4).

Mr. Bramhall, the clerk of the Police Court, testified that on December 9, 1937, at a meeting of the Police Court Judges with the members of the Committee (petitioners in the court below and respondents here), the complaint of Hans Otto Stasch against John P. Mullen was read to those assembled and discussed.

Notwithstanding the fact that our local bar has a grievance committee for such matters, and a statute provides procedure to correct such evils in the bar, (Sec. 219-220) D. C. Code (1924), the Judges of the Police Court, after hearing and discussing the charges, directed the Committee to institute proceedings against Mullen for solicitation and assisting bondsmen to obtain an excessive and unlawful bond premium. The Court advised the committee to present those charges *to that same court for determination*. The Court also directed the Committee to prefer charges against McGee and Mendelson for charging an excessive and unlawful bond premium. However, the latter charges were dismissed and are not here under review. The minutes of the Police Court of October 17, 1937, which were signed by Judge Hobart Newman, indicated that the committee consisting of petitioners below and respondents herein was appointed by the Court for the purpose of investigating and prosecuting attorneys and bondsmen who are alleged to have been guilty of unprofessional conduct (R. 6, 7, 8, 9).

The witness Nielson testified (R. 14) that on October 20, 1937, he was an assistant corporation counsel for the District of Columbia and was in charge of jury cases assigned for that day. Judge Curran was presiding on the bench. The witness stated that Hans Otto Stasch pleaded guilty to the charge of operating under the influence of liquor and was fined \$150.00, or in default sentenced to ninety days in jail. The case had been

continued several times for the purpose of permitting Stasch to pay his fine. He further testified that the respondent Mullen, as attorney for Stasch, discussed the case with him. Immediately thereafter the plea of guilty was entered. He had a faint recollection of a discussion relative to a fine of \$75.00. He said that Judge Curran imposed a fine of \$250.00 but that Mullen made certain explanations to the Court relative to Stasch's financial circumstances and the Court reduced the fine to \$150.00 and granted to Stasch until November 15, 1937, to pay the fine. He further testified that Stasch made no complaint whatsoever to him about his attorney or any bond premium and gave no indication in any way, shape or form that he was dissatisfied with the case.

August Stasch was produced as a witness by the committee and testified that he was the father of the defendant Hans Otto Stasch. He identified certain committee exhibits which were checks that had been charged to his account and which had been paid.

Hans Otto Stasch was called as a witness on behalf of the committee and stated that he lived in Mechanicsville, Maryland, all of his life, with the exception of a few months that he lived at 415 6th St. On Saturday, June 26, 1937, he was arrested and the following Monday was brought to the Police Court; that during the interim he remained at No. 11 precinct and that while he was sitting within the prisoner's dock in Police Court the respondent Mullen walked up to him and said, "You have got a pretty stiff case up there, haven't you? How about me representing you?" He then asked Stasch if he had any money, to which Stasch replied—no. He then replied, "How about representing you?" The witness replied, "I haven't any money unless some friends would post it for me."

He testified that the respondent Mullen came three or four times about money. He did not know Mullen's name and had not asked his name. He did not request Mr. Mullen to act for him. He testified that he finally told Mullen after seven or eight inquiries that he would let Mullen represent him if he got him out, and that until that time nothing had been said about a fee. He agreed to let Mullen represent him (R. 18, 19). Finally, bond was arranged and the witness was released. The witness knew a bondsman by the name of O'Connor but Mullen stated that he had a bondsman for him, but he didn't tell him who he was. The witness did not personally ask any one to go his bond. He testified that on his way out of court, and while journeying to bondsman McGee's office, Mullen stated, "We'll get you out of this mess for \$100.00." Stasch was taken from place to place in Mullen's automobile for the purpose of raising funds to pay the premium on the bond (R. 22). Up to that time he did not know Mr. McGee nor had he asked him to write his bond. After being unsuccessful in obtaining the money, Mullen advised Stasch that if he could get the money by nine-thirty that night it would be all right. He said that Mullen entered the house where he went to raise the money and remained in the front room, and that Mullen stated that he would have to pay the money that night or go back to jail. The witness replied that he realized it. He further testified that Mullen advised him that if he could get \$75.00 he, Mullen, would stand the other \$25.00. The entire \$100.00 was to be for the bond premium and nothing was said about a fee at that time. The witness then went to see his father in Mechanicsville, Maryland, and obtained two checks, one for \$75.00 made payable to Joseph P. McGee and one for \$25.00 made payable to

John P. Mullen; that after getting the checks he returned to Washington and, en route, called up Mr. Mullen to say that he could not be at his office by nine o'clock but that he would be there as soon as possible; Mullen replied that it was all right, he would wait for him. He arrived between nine and ten o'clock and gave Mullen the \$75.00 check and Mullen said, "That is all right, Stasch. I will take care of it." Mullen told him to return on Friday, but gave him no receipt for either check. Later he gave Mullen a check for \$50.00 and Mullen said, "It will cost you \$50.00 instead of going to jail." About a week later Mullen said that he wanted an additional \$75.00 for the purpose of keeping the witness out of jail. He said that Mullen never got a statement from him as to the facts in the case and never to his knowledge did Mullen see a witness for the purpose of getting ready for trial, and never, to the witness' knowledge, did he do anything to prepare for trial. Eventually, Mr. Mullen advised the witness to plead guilty. The witness testified that during the entire time he thought the bond was \$800.00.

The cross-examination of the witness Hans Otto Stasch indicates the witness to be so thoroughly unreliable and untruthful and indicates to such an extent the lack of credibility that should be given to his testimony, that counsel for the appellant invites the Court's attention to the cross-examination *in toto* which is set out in the Record beginning at page 27 and ending at page 68.

Thereupon counsel for the respondent Mullen moved that the testimony of Hans Otto Stasch be stricken from the record for the reason that it was patently unworthy of belief. The motion was overruled (R. 68).

Respondent McGee, who was a professional bondsman associated with respondent Mendelson, testified

that Mullen requested him to become surety on Stasch's bail bond. He did so and made the customary inquiries of Stasch relative to his history (R. 69, 70). He asked him for a \$25.00 premium on the \$500.00 bond. Stasch replied that he would go and get it. The witness accompanied Stasch and en route the prisoner inquired if Mullen was all right because a prisoner in the dock had recommended him. Witness replied that he was all right (R. 71). Stasch was unable to get the money at the house he visited and the witness told him, "Boy, go back in the house and get the \$25.00." Stasch requested the witness to drive to Mechanicsville in order to obtain the money from his father. Witness declined. Mullen and the witness then returned. The latter saw no more of Stasch until the trial (R. 71). The morning after the prisoner was released on bond, the witness saw Mullen, who said, "Here is a check from Stasch." McGee replied, "Get it cashed, take yours and give me mine." Hyman Mendelson, a partner of the witness and who had signed the bond, agreed to go to the bank in order to get it cashed. McGee and Mendelson went to the bank and got the check cashed. Mendelson pocketed \$25.00 and said the balance was Mullen's (R. 72). The witness stated that Stasch knew the amount of the bond (R. 75).

The witness Mendelson testified that he was a bail bond broker, associated with McGee for several years. He and Stasch signed the latter's recognizance to appear in court and both of them must have heard the clerk state the amounts of the recognizances to be \$200.00 and \$300.00 (R. 84), and take their respective oaths thereon. He also heard McGee tell Stasch the bond premium was \$25.00. The next morning he cashed a \$75.00 check made payable to McGee for the reason that neither McGee nor Mullen had a bank

account. He kept \$25.00 and gave \$50.00 to Mullen (R. 86).

Mullen, after introducing character testimony which included the President of the American Bar Association as set out in the record (R. 914-916), testified in his own behalf that he had been a member of the bar since 1916 and that he had not the slightest intimation that there was any criticism of his conduct in the Stasch case until December 14, 1937. He said that one of the probation officers of the Police Court telephoned his office that Stasch wished to see him. He came to Police Court and saw Stasch, who advised him that a fellow-prisoner had recommended him. He learned from Stasch the nature of the charge and asked whether he had been in trouble before. He asked Stasch if he had been drinking and he replied that he had had several bottles of beer. He then advised Stasch to plead not guilty and demand a jury trial. In the colloquy between the presiding Judge and the respondent Mullen, relative to the reduction of Stasch's bond, the latter stood beside him. The bond was reduced from \$800.00 to \$500.00 and Mullen inquired whether Stasch could make bond or pay a retainer. Stasch then advised Mullen of his family connections. Mullen advised the bondsman, McGee, of the situation and told him he thought Stasch to be all right. Mullen stated that after Stasch's release from Police Court he felt somewhat responsible for the liability of McGee on the bond and for that reason he went with Stasch to a house for the purpose of collecting the money. He remained in the parlor and Stasch asked the matron at the house for \$75.00, which she declined to give. Later that evening Stasch came to Mullen's office with a check made payable to McGee and Mullen said, "Why did you make the check payable to McGee when I am

representing you?" Stasch replied that he had McGee's card (R. 100, 101). Mullen said that he interviewed Stasch as to whether he was drunk when arrested and he replied he was not, but that he had a collision which gave the officer the impression that he was drunk. He also asked Stasch the name of his companion who had fled but Stasch could not tell him his name or his whereabouts. He advised Stasch to get character witnesses as to his reputation for sobriety for the reason that at that time there was a vigorous civic and newspaper campaign against driving an automobile while intoxicated. He did advise Stasch that he handled quite a few of those cases and that he would do all that he could to protect his interests. Stasch left and promised to return later. He said that some time later Stasch came to his office to pay the \$50 balance that was due on his fee. Mullen was busy at the time but Mr. Rossiter, who is employed in his office, accepted the money and gave him a receipt. Stasch seemed to be in a hurry and could not wait until Mullen was finished the business he was then transacting. He further testified that Stasch returned to his office regularly about once a week to discuss his case. On one occasion Mullen inquired of the officer in the case what Stasch's condition was at the time of his arrest and the officer advised him that he was quite drunk. Respondent advised Stasch to make reparation for the damage done to the automobile that he had collided with on the night that he was arrested. The party whose car was damaged was sympathetically disposed and came to his office on two occasions and said that she would do whatever she could for Stasch but maintained that he was drunk (R. 102). The witness discussed the case with the Assistant Corporation Counsel and the latter indicated to him Stasch's police record. Respondent

advised Stasch that the trial of the offense would be futile, and waste the time of the Court and jury. He further advised Stasch of the preparation that had been made in his case. Mullen testified that the case had been continued several times and was finally set for a definite date (R. 103). Assistant Corporation Counsel Nielson was in charge of prosecution of the case at Police Court and on the date the case was set for trial Stasch pleaded guilty. The Corporation Counsel had recommended a \$75.00 fine but the Court refused to accept it and imposed a fine of \$250.00. Respondent indicated to the Court the position of his client and finally the court reduced his fine to \$150.00 which respondent stated was a reasonable fine in view of his prior record but requested the court to give Stasch thirty days in which to raise the money. The court granted this request and the clerk made the proper notation. Respondent then advised Stasch to have his father obtain some reputable people and substantial citizens to write to Judge Curran indicating Stasch's background for the purpose of having the Judge reduce the fine. At the expiration of the thirty-day period in which the money should be raised Mullen saw Stasch in court and the latter advised him that he had not raised the money and that his father refused to help him. Stasch requested a continuance of a week and respondent saw Judge Curran relative thereto and learned that another attorney had also been to see Judge Curran about the same case. At any rate the case was postponed for a week and at a later time for two weeks. On or about November 26, 1937, Stasch came to respondent's office and as a result of his call respondent wrote a letter to his father asking him if he would not intercede on behalf of his son. Since that time respondent heard nothing or knew nothing about

the case. He had not the slightest intimation that Stasch was dissatisfied with his services and the next he heard was the proceedings brought against him herein. On cross-examination the witness insisted that he was originally called by one of the probation officers who advised him that Stasch wished to see him. As a result of that call he requested an interview slip which is customary in the Police Court. The Court signed the slip granting permission to Mullen to interview Stasch.

Mr. O'Day, the Assistant Corporation Counsel, testified as to conversations he had with Mullen relative to the case (R. 120).

The witness Bouscaren, who was an assistant probation officer of the Police Court, testified that she frequently called Mr. Mullen and indicated that she did not recall telephoning Mullen for Stasch nor could she recall Stasch (R. 122).

The witness Hare testified that on one occasion he was in Mullen's office when Stasch came in with a check that had been made payable to McGee and Mullen asked Stasch why it was payable to McGee and Stasch replied that he had McGee's card in his pocket (R. 122). He said that he remembered the incident so well because he knew the history of respondent Mullen in attempting to get legislation to regulate the bonding business in the District of Columbia (R. 123, 124).

Another witness testified as to the services rendered to Stasch by Mullen (R. 124, 125).

At the close of the entire case Mullen again moved that the charges be dismissed for the reasons hereinbefore set out and also upon the ground that the Police Court of the District of Columbia was without jurisdiction to impose a sentence of disbarment or censure and that generally upon all of the testimony in the case there was no sufficient evidence upon which the court

could find against the respondent. The court overruled the motion and allowed an exception and found the respondent guilty as set forth in the opinion of the court.

ARGUMENT.

POINT I.

THE POLICE COURT OF THE DISTRICT OF COLUMBIA IS WITHOUT JURISDICTION TO ENTER AN ORDER OF DISBARMENT, SUSPENSION OR CENSURE.

For the purpose of convenience, Assignments of Error numbered three, four and seven will be consolidated herein. Respondent maintains that it is an elementary principle of law that a court that has no jurisdiction to admit attorneys to practice has no jurisdiction to suspend or disbar them. The admission and suspension of attorneys in the District of Columbia is controlled by statute. Sections 52, 53, 54, 55, Title 18, D. C. Code (1929) provide:

"Admission to Bar; Rules for Examinations, etc.; Oath.—The Supreme Court of the District of Columbia in general term shall have full power and authority from time to time to make such rules as it may deem proper respecting the examination, qualification, and admission of persons to membership in its bar *and their censure, suspension, and expulsion; * * *. (Italics ours.)*

"Same; Power of Censure, Disbarment, etc.—Said Supreme Court, in general term, shall have full power and authority to *censure, suspend* from practice, or *expel* any member of its bar for any crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, *or any conduct prejudicial to the administration of justice.* Any fraudulent act or misrepresentation by an applicant in connection with his application or admission shall be sufficient cause for the revocation by said court of such

admission. (Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1224, c. 854, sec. 219; Apr. 19, 1920, 41 Stat. 561, c. 153.)

"Same; Disbarment upon Conviction of Crime.— Whenever any member of the bar of said court shall be convicted of any offense involving moral turpitude, and a duly certified copy of the final judgment of such conviction shall be presented to said court, the name of the member so convicted may thereupon, by order of said court, be stricken from the roll of the members of said bar, and he shall thereafter cease to be a member thereof. In the event of appeal from any such judgment of conviction as aforesaid, and pending the final determination of such appeal, the said court may order the suspension from practice of such convicted member of the bar; and upon a reversal of such conviction, or the granting of a pardon, said court shall have power to vacate or modify such order of disbarment or suspension. (Apr. 19, 1920, 41 Stat. 561, c. 153.)

"Same; Procedure for Disbarment.— Before any such member of the bar is censured, suspended, or expelled as provided by section 53 of this title, written charges, under oath, against him must be presented to said court, stating distinctly the grounds of complaint. Said court in general term may order said charges to be filed in the office of the clerk of said court and shall fix a time for hearing thereon. Thereupon a certified copy of said charges and order shall be served upon such member personally by the marshal or such other person as the court may designate, or in case it is established to the satisfaction of the court that personal service can not be had, a certified copy of such charges and order shall be served upon him by mail, publication, or otherwise as the court may direct. At any time after the filing of said written charges the court shall have power, pending the trial thereof, to suspend from practice the person charged. (Mar. 3, 1863, 12 Stat. 762, c. 91; Mar.

3, 1901, 31 Stat. 1224, c. 854, sec. 220; Apr. 19, 1920, 41 Stat. 561, c. 153.)”

Title 18, Sections 151 et. seq. D. C. Code (1929), provide for the creation of the Police Court of the District of Columbia. The statute outlines the jurisdiction of the Police Court (152) and also gives it authority to promulgate such rules and regulations as may be necessary for conducting business in the court.

“The Police court shall have power to issue process for the arrest of persons against whom information may be filed or complaint under oath made and to compel the attendance of witnesses; to punish contempts by fine not exceeding twenty dollars and imprisonment for not more than forty-eight hours, or either, and to enforce any of its judgments by fine or imprisonment, or both, and to make such rules and regulations as may be deemed necessary and proper for conducting business in said court.”

The Court's attention is invited to the significant fact that nothing contained in the statute gives the Court the power either to admit to practice or suspend or censure. The statute did confer the power to hold for contempt of court.

The Police Court, the Municipal Court and the Juvenile Court of the District of Columbia are all courts of inferior jurisdiction. Admission to the bar of the District Court of the United States for the District of Columbia ipso facto admits to membership in the courts of inferior jurisdiction in the District of Columbia.

In the case of *United States Ex Rel. Alward v. Latimer*, 44 App. D. C. 81, the Supreme Court of the District of Columbia issued a writ of certiorari to review the judgment of the Juvenile Court of the District of

Columbia which had issued a rule to show cause on Alward, an attorney at law in the District of Columbia, for the reason that he attempted to hinder and delay the administration of justice in the Juvenile Court. Alward was counsel in a case in that court identified as *United States v. Zell*. Alward advised Zell to absent himself from the jurisdiction and thus evade the process and orders of the Juvenile Court. The rule further alleged that Alward aided and abetted Zell in so absenting himself. The rule then required that Alward show cause, if any he had, why he should not be adjudged in contempt of court and suspended from practice in the Juvenile Court. Alward maintained that if contempt of court existed, it was committed without the presence of the court and therefore being a court of limited jurisdiction, it had no power to punish for such contempt. Latimer, the Judge of the Juvenile Court, moved to squash the writ on the ground (1) that the Juvenile Court of the District of Columbia has jurisdiction to punish for contempts interfering with the administration of justice in that court; (2) the Juvenile Court has inherent jurisdiction to suspend from practice before the court any person guilty of the misconduct recited in the rule to show cause. The motion to dismiss was granted and an appeal was had to this court.

The opinion of this Court recited that the question presented is, "Was the Juvenile Court without jurisdiction to punish for contempt." The Court said:

"There is no special bar of the Juvenile Court; all members of the bar of the Supreme Court of the District of Columbia are permitted to practice therein.

"The rule served on the petitioner is not that he show cause why he should be disbarred, but simply

that he should be suspended from practice before that court.

"The power to suspend from practice in that court is one that is within its sound discretion.

"The order suspending petitioner does not mean that he shall not practice his profession, but simply that his right to do so will not be recognized in that tribunal.

"We think that the court would be authorized to suspend an attorney from practice before that court in a case where he has aided and abetted a prisoner in evading a trial. *M'Whorter v. Bloom*, 3 N. J. L. 545."

It is respectfully submitted that the above case is not decisive of the instant case for the reason that in the former a contempt of court was charged as well as an attempt to render the processes of the Juvenile Court unavailing while in the instant case no contempt of court is charged and a mere single act of solicitation is presented.

In the case of *In re Adriaans*, 17 App. D. C. 39, Adriaans was convicted in the Police Court of the District of Columbia of a malicious trespass. A motion for a new trial was filed by Adriaans in which he alleged grounds which the court thought to be scandalous and libelous and therefore struck the motion from the files. Adriaan petitioned to the Court of Appeals for a writ of mandamus or certiorari to the Police Court seeking a review of the proceedings therein. He again alleged scandalous and libelous matter. The Court said:

"This case, like all others of its kind, involves questions of a very delicate nature, and consequences of more than ordinary importance, and especially to the party against whom the proceeding is taken. *To deprive a party of the privilege of pursuing his profession, can only be done by virtue*

of a power the existence of which is recognized as matter of necessity; and that power should only be exercised for very cogent reasons, and where it is necessary for the preservation of the integrity and purity of the profession, and the orderly administration of justice by the courts in which the members of the bar practice. Or, as said by Chief Justice Marshall, speaking for the Supreme Court, in the case of *Ex Parte Burr*, 9 Wheat. 529,—‘On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.’ This was said on an application to the Supreme Court of the United States for a mandamus to the circuit court for the District of Columbia, to require the latter court to restore Burr, the petitioner, to membership of the bar from which he had been suspended.

“The power of suspension or disbarment of an attorney from the right to practice in the court for cause shown, is quite different and distinct from the power to punish for contempt; though it is frequently the case, that the causes for removal from the bar may also present ground for punishment as for contempt. *Ex parte Bradley*, 7 Wall. 364, 374; *Beene v. State*, 22 Ark. 151; *In re Pryor*, 18 Kans. 72. It is not by way of punishment, however, that the offending attorney is disbarred; but the

court in such cases exercises its discretion, whether a party whom it has formerly admitted to the privilege of an attorney is a proper person to be continued on the roll or not. This is the principle laid down as unquestionable doctrine, by the Court of King's Bench, after conference with all the judges, in the leading case upon the subject, of *Ex parte Brownsall*, Cowp. 829, 830; and which is quoted with approval by the Supreme Court of the United States, in *Ex parte Wall*, 107 U. S. 265, 273. See also cases of *In re Weare*, 2 Q. B. 439 for 1893; *Ex parte Finn*, 32 Oregon, 519."

The Court's attention is respectfully invited to the fact that this is a case of first instance in this jurisdiction. The petitioner Mullen was not charged with contempt of court. If he had been no contention would be made of the jurisdiction of the lower court to punish for contempt. However, notwithstanding the statute provides explicitly for the censure, suspension and disbarment of attorneys, by the District Court of the United States for the District of Columbia, the Police Court of the District of Columbia attempted to usurp the jurisdiction thus expressly conferred.

The statute recognized that the high character of the bar was so essential to the welfare of the community that it vested the power to censure, suspend or disbar in a court of general jurisdiction. It necessarily prohibited that power to any other tribunal.

In the case of *Cook County National Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 539, the Supreme Court said:

"A law embracing an entire subject dealing with it in all its phases, may thus withdraw the subject from the operation of the general law as effectively as though, as to such subject, the general law were in terms repealed."

In *25 Ruling Case Law*, 982, Section 229, the author states, a statute directing that a thing be done by a specified officer or tribunal implies that it shall not be done by a different officer or tribunal, citing *People v. Gibson*, 53 Colo. 231, 125 Pac. 531; *Taylor v. Taylor*, 66 W. Va. 238, 66 S. E. 690.

The author also states that a statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise. Citing *Raleigh Ry. Co. v. Reid*, 13 Wall. 269; 20 L. Ed. 570 and other cases.

The Supreme Court in *Raleigh v. Reid*, *supra*, says:

“When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.”

In support of petitioner's position that the Police Court was without jurisdiction, we suggest the case of *In re Wilson*, 100 P. 75, 79 Kan. 450, wherein the bar association filed a report to the District Court of the Shawnee County, relative to the conduct of Wilson. The District Court appointed a committee to prepare and prosecute an action against appellants. A judgment of disbarment was entered in the District Courts of the State. On appeal it was maintained that the District Court had no jurisdiction to disbar for the reason that the statute vested in the Supreme Court alone the power to admit persons to practice. However, the statutes of Kansas gave jurisdiction to disbar to both the Supreme Court and the District Court. The Court said:

“True it is that under the common law, courts that possessed jurisdiction to admit attorneys, have jurisdiction also to disbar them, and it has

been held in some courts that the jurisdiction is correlative, that conversely a court that has no jurisdiction to admit attorneys to practice has no jurisdiction to disbar."

In the case of *State ex rel Jones v. Laughlin*, 73 Missouri 443 (1881), the St. Louis criminal court attempted to exercise jurisdiction over an attorney for alleged fraud upon the court. A rule to show cause was issued upon the attorney to indicate why he should not be stricken from the rolls and disbarred. A writ of prohibition was sought. The Court said:

"There is no doubt of the power of a court of general and common law jurisdiction for good cause, to disbar or strike from its rolls any attorney of such court. This power exists at common law, independent of statutory aid; exists as a power inherent in courts of that description. * * * The St. Louis criminal court is a court of purely statutory origin, having been created by the act of the legislature. It is a court, also, of inferior and limited jurisdiction, that jurisdiction being confined to criminal causes alone arising within the limits of St. Louis. This court being the mere creation of the legislature owing its origin as well as its jurisdiction and powers to the legislative will, it was clearly competent for the legislature to enlarge or restrict those powers, or to abolish the court altogether.

* * * * *

"But in relation to grounds of this nature, the legislature has specifically provided that an attorney may be suspended or removed from practice upon such charges being exhibited and proceedings therein had in the Supreme Court, the St. Louis Court of Appeals or the Circuit Court. By thus pointing out the particular courts in which the proceedings are to be instituted for suspension or disbarment of attorneys, the legislature evidently

intended and in fact has said, that courts, other than those mentioned, should possess no power of suspension or removal for any of the grounds set forth in the statute. Affirmative specification excludes implication, the expression of one thing is the exclusion of another. (Italics ours.)

"Other reasons may also be urged which favor the conclusions we have reached. The power to license attorneys is also conferred on the Supreme Court, the St. Louis Court of Appeals and the Circuit Court. It will not be claimed that the St. Louis criminal court possesses such power. But for a license granted by one of the superior courts, which the statute designates, an attorney could not practice his profession in an inferior court. No instance, it is believed, can be found, where a court not recognized to admit to the bar has attempted to revoke a license granted by a superior court by disbarring one admitted by the latter.

"Upon this ground, no doubt, rests an early case where an attorney accused of malpractice in an inferior court was proceeded against, not in that court, but in a court which possessed the power to admit. And the reason given therefor was that an attorney can not practice in an inferior court, if he is not an attorney of a superior court and that is the reason why the court interferes." (Cases cited.)

The court granted the writ of prohibition.

In the case of *Bloomington Bros. Inc. v. Hudson*, Sup. Ct. App. Term, 1st Dept. (1933) 264 N. Y. S. 639, the Court said:

"No doubt the Municipal Court has some right to exercise control over attorneys appearing before it. No doubt in a proper case it could adjudge an attorney in contempt for misconduct in its presence. But certainly it can not be supposed to have any power to discipline attorneys for general misconduct or for the violation of the canon of ethics."

Bear in mind that petitioner was suspended for the reason that he solicited a single case.

For these reasons it is respectfully submitted that the statute in the District of Columbia confers upon the District Court of the United States for the District of Columbia the exclusive power to admit attorneys to practice and the co-relative right to disbar, suspend or censure. Where a statute provides for expulsion or disbarment of an attorney by a superior court, it necessarily excludes the implication that a court of limited jurisdiction has the right to provide its own rules of conduct for the admission or disbarment of attorneys. Suspension is temporary disbarment and in order for the Police Court to suspend Mullen, it should have proceeded as provided by statute. Respondent submits that there can be no question about the general law that a specific statute always governs. Any general law, usage or custom to the contrary must fall. Where a statute vests the power to disbar or suspend in certain courts, a court not specified in that statute has no jurisdiction to act in such matters. A general discussion of the law will be found in 7 *C. J. S.* page 730, *Sec. 18D* and *Thornton on Attorneys at Law*, Vol. 2, 1178, *Sec. 768*.

For the above reasons it is respectfully submitted that the Police Court of the District of Columbia was without jurisdiction to do that which it attempted to do herein and its action should be reversed.

POINT II.

ONE UNAGGRAVATED ACT OF SOLICITATION IS
NOT SUFFICIENT MISCONDUCT TO SUSPEND
OR DISBAR.

Assignments of error numbered five and six are incorporated in Point II and maintain that even though the

witness Stasch, who appeared for the committee below, was entitled to full credence, the worst that was established was a single act of solicitation. Petitioner maintains that a single act of solicitation not accompanied by fraud, duress, misrepresentation, dishonesty or trickery is not such unprofessional conduct as to warrant a suspension from practice for a period of six months. As indicated in the petition for writ of error, of all the numerous cases that have been examined for the purpose of presenting this matter to this court, counsel for the respondent have not found a single case wherein one act of solicitation has constituted unprofessional conduct within the meaning of that phrase. The *Canons of Professional Ethics of the American Bar Association* provide, Sec. 27:

“The customary use of simple professional cards is permissible. Publication in approved law lists and legal directories, in a manner consistent with the standards of conduct imposed by these Canons, of brief biographical data is permissible. This may include only a statement of the lawyer’s name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and of admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, bar and other association memberships and, with their consent, the names of clients regularly represented. This does not permit solicitation of professional employment by circulars, or advertisements, or by *personal communications, or interviews not warranted by personal relations*. It is unprofessional to endeavor to procure professional employment through touters of any kind. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in con-

nection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible."

There is no provision of law in the District of Columbia and no adjudicated case that directly or indirectly forbids an attorney from soliciting business. In other jurisdictions we find the case of *Chreste v. Louisville R. Co.*, 167 Kentucky, 75, 180 S. W. 49, L. R. A. 1917B 1123. The court had for consideration a suit for an attorney's fee. It seems as though evidence was introduced to indicate that the attorney had solicited the case and for that reason the contract of payment was unenforcible for the reason that the contract was against public morals and public policy.

The Court gave a lengthy discussion on the soliciting of business by lawyers and said:

"There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking their friends to send them business; others by applying directly or through the medium of friends, for employment by firms and corporations, with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If

some forms are to be permitted, while others are to be condemned, where shall the line be drawn? We recall one case where some parties visited an old lawyer and asked him what they should do. He replied that they ought to employ a lawyer. Thinking that the case was too small for him to take, they asked him to recommend a lawyer. He replied: 'I will be glad to attend to the matter for you.' On which side of the dividing line would such solicitation fall? If it be lawful for an attorney to send out announcement cards, or insert an advertisement in the newspaper, or buy stock in a corporation, with the understanding that he is to be employed as counsel, or ask his friends to recommend him for employment by firms or corporations, how can it be said that, if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy? In saying this we are not unmindful of the fact that what is usually termed 'ambulance chasing' does not comport with the highest ideals of the profession. We do not wish to be understood as sanctioning such conduct. On the contrary, we take advantage of this occasion to express our unqualified disapproval of this method of obtaining law business. But it must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of an attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and yet it may fall far short of being so injurious to the interest of the public, as to invalidate a contract of employment thus obtained. * * *

"Considering the difficulty of fixing the dividing line between what is proper and improper solicitation, the uncertainty that the doctrine would introduce into all contracts between attorneys and

their clients, the fact that solicitation is not condemned at common law or denounced by our Constitution or statutes, and the further fact that it is difficult to perceive upon what theory it can be said to be clearly injurious to the public good, we conclude that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence, or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy."

There is an extensive note in *L. R. A.* 1917B, page 1128, on the right of an attorney at law to solicit business. Most of the cases that determine solicitation to be undignified but not unlawful are cases where an attorney has sued on a contract for services rendered and the defendant interposed a defense of solicitation on the part of the attorney.

In the case of *Ingersoll v. Coal Creek Coal Co.*, 98 S. W. 178, 9 L. R. A. n. s. 282, the court had before it a case of a mine explosion. The Ingersoll law firm sent a young layer to solicit business. He entered actively into the contest for business. He practiced no fraud or undue influence nor did he make any misrepresentations to get the business for his firm. He saw widows whose husbands had been killed. He saw relatives whose next of kin had been injured in the explosion. He saw many other lawyers there doing the exact same thing. One hundred and fifty cases arose out of the explosion and some forty of them went to the Ingersoll firm. The firm prepared and filed declarations in all the cases and the Coal Company was notified of the fact that they were attorneys of record therein.

The Court of Chancery Appeals then proceeded to

state the question involved, as it appeared to them, and gave their conclusion as follows:

“The question, under the facts thus stated, in its legal essence, is: If a lawyer accept cases and institute suit on them, which he knows were procured by open, personal solicitation of another lawyer from strangers to both, no fraud or misrepresentation appearing in the solicitation, the lawyer instituting the suits agreeing to pay the soliciting lawyer one third of the fees legitimately chargeable in the cases, is he guilty of a violation of public policy and of his oath as an attorney under our statute, and hence, under the law, debarred the right to recover his fees, no infidelity to the interest of his clients being imputed to him?

“The question with respect to the underlying principle involved may be more briefly stated in another form: Is it a violation of the public policy of this state, and a contravention of the oath of a lawyer under our statute, for the lawyer to personally and openly solicit legal business from strangers to him?

“Our statute (Shannon's Code, Sec. 5781) provides that the ‘several courts of this state may strike from their rolls any person not authorized to practice in such courts, and also any practising attorney or counsel, upon evidence, satisfactory to the court, that he has been guilty of such misdemeanor or acts of immorality or impropriety as are inconsistent with the character, or incompatible with the faithful discharge, of the duties of the profession.

“As a matter of general law, statutes of this character are not restrictive of the general powers of the court over attorneys practising before it.

“Attorneys at law are officers of the court, and the court may exercise its jurisdiction over them, depriving them of their office and striking their names from the rolls. This power and jurisdiction are indispensable to protect the court, to attain the orderly administration of justice, to uphold the

purity and dignity of the profession, and promote the public welfare and secure the interests of clients. It is a power inherent in the court itself, and exists independent of statutes, although statutes may regulate its exercise. *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *People ex rel. Elliott v. Green*, 7 Colo. 237, 244, 49 Am. Rep. 351, 3 Pac. 65, 374; *Re Henderson*, 88 Tenn. 531, 13 S. W. 413.

"Is the personal solicitation of business by a lawyer from strangers that they intrust the bringing and prosecution of such suits as they may desire to bring to enforce their rights, an act of immorality, or an act of impropriety, inconsistent with the character of the duties of the profession? There is nothing immoral *per se* in the solicitation, unless the inherent nature and quasi official character of the labor involved in the pursuit of the profession in courts in the trial of cases make it so.

"Lawyers, as men, are as other men, and men in all other pursuits and professions solicit business. Merchants seek business by personal solicitation, and through paid agents seek it. Hotel keepers strive for it by runners to meet trains, newspapers ask for it by paid solicitors, and officeholders go for it and labor with much sweat to keep it. And even preachers sometimes seek charges.

"But while lawyers, as men, are as men of other pursuits, and, generally speaking, no better and no worse, nevertheless, in the prosecution of their profession, they are differentiated from all other professions and callings. In the first place, they can not practise their profession without a license. In the second place, they are required to possess a good moral character and certain legal attainments. In attending to legal business, especially in cases intrusted to them, they act as officers of the law and the courts, and in an important sense represent the public, in that it is their duty to aid in administering justice and preserving the integrity of the

governmental agencies of the state, thus securing the confidence of the people in the honesty of their purpose and aid to conserve the end for which they are established.

"We have found no decision of any court and no text-book authority holding that the personal solicitation by a lawyer to strangers to employ him to bring and prosecute such suits as the strangers may have the right to have instituted, constitutes a violation of the lawyer's oath of office, or is such an act of impropriety as authorizes his disbarment under statutes similar to ours." (Italics ours.)

The case of the petitioner is not that of the "ambulance chaser," which term is generally used to designate the activities of those laymen who acquaint themselves with the occurrence of accidents and approach the injured person with a view toward soliciting employment for an attorney at law, in the conduct of the litigation arising from the accident. "Ambulance chasing" is usually done on a large scale and many cases result to the attorney. In the instant case there is but a single charge of solicitation. It is frankly stated to the court that during the past ten years or longer Mullen's practice has been almost exclusively in the Police Court of the District of Columbia. There was no proof that the respondent Mullen employed runners to obtain clients for him in the Police Court. This court will notice as a matter of common knowledge that the District Court of the United States for the District of Columbia has sustained the advertising by trust companies of their ability to handle estates which from time immemorial has been the business of lawyers. If on the one hand trust companies solicit the public in general and advertise that they are equipped to handle such matters and such conduct is sustained by the court, how can the petitioner Mullen be guilty of unprofes-

sional conduct and temporarily disbarred for the solicitation of a single case? We again reiterate that this solicitation was denied, but taking it as a fact, it is believed that the court below erred in suspending Mullen.

In the case of *State v. Smith*, 99 S. E. 332, 84 W. Va. 59, it was held that an attorney's solicitation of employment will not under all circumstances justify his disbarment or suspension, but in order to justify that, the solicitation must be in a dishonorable or disreputable manner, and where it consists of a mere effort to honorably procure employment for legitimate purpose, it is no ground for suspension or disbarment.

The Court used this exact language:

"A general statement that one soliciting employment without showing that such solicitation was in a dishonorable or disreputable way is not sufficient charge to justify suspension or disbarment." Citing *Thornton on Attorneys at Law*, Sec. 844.

In 7 C. J. S. 758, section 23, paragraph H, the author states:

"Under the rule that professional conduct renders an attorney subject to disciplinary action, various acts of misconduct have been held sufficient or insufficient to authorize suspension or disbarment such as: * * * soliciting business in an unprofessional manner."

The author cites cases from the Federal Court in Maryland as well as from the courts of the states of, California, Colorado, Illinois, Iowa, Minnesota, Missouri, New York, Ohio and Washington.

Counsel for petitioner has examined every case cited by

the annotator and in none of the cases was a single act of solicitation the basis of the charges for disbarment or suspension. It is true that in the case of *In re Schwartz*, 26 N. Y. S. 343, there was only a single solicitation. However, the circumstances in that case were aggravated by the perjury of the attorney before the referee when he denied all knowledge of the incident or the case resulting therefrom. It is respectfully submitted that if no State has ever determined that a single unaggravated act of solicitation was sufficient to censure, disbar or suspend, it is persuasive evidence of the fact that no court has ever considered such conduct prejudicial to the Court or Bar. The action of the lower Court was erroneous.

POINT III.

THE EVIDENCE WAS LACKING IN SUFFICIENCY AND CREDIBILITY.

An examination of the evidence herein will indicate that the only witness for the committee relative to solicitation of business by respondent was Hans Otto Stasch, whose testimony was so unworthy of belief that we invite the Court's attention to the dissenting opinion of Judge Curran in the Court below:

"I concur with the majority of the Court in the dismissal charges against the respondents, Mullen, Mendelson and McGee, with respect to the charges of conspiring together to charge excessive bond premiums.

"I dissent from the decision of the majority of the Court in holding respondent Mullen guilty of unprofessional solicitation of business from one Hans Otto Stasch. With the dismissal of the charges against all three respondents, there remains to be considered only the testimony of Hans Otto

Stasch and the testimony of respondent Mullen on the question of whether there was an unprofessional solicitation. The practice of the law is a precarious one and it offers a fertile field for many complaints by disgruntled clients. Weighing the evidence in the instant case, I have no hesitancy in arriving at a conclusion that the respondent Mullen is not guilty of the charges. In order to convict in this case, it is necessary to take the word of the witness Stasch, a man who stands convicted of a crime involving moral turpitude, a witness who deliberately perjured himself on the witness stand in this very Court, a witness who, in my opinion, did not and could not tell the truth. If he falsified in one respect, it appears to me, from all his testimony, that he would falsify in another. Against his testimony stands the testimony of the respondent Mullen, whose reputation stands untainted. It might appear that his memory was a bit hazy about what actually took place, but that is not surprising in view of the fact that a long period of time elapsed between the time of his first meeting with Stasch and the time of the respondent's trial. In addition to the respondent Mullen's denial of the charges and his explanation of what took place, there was put in evidence testimony of prominent professional and business men as to the respondent's reputation for veracity, honesty, and integrity. Taking Mullen's testimony, together with the testimony of highly respectable citizens as to his good character, there is generated in my mind a very great doubt as to the guilt of Mullen on the charges of unprofessional solicitation. From all the evidence on both sides, there is predicated in my mind an hypothesis of innocence consistent with an hypothesis of guilt. I, therefore, must follow the dictates of my own conscience and dissent from the decision of the majority of this Court and believe that all charges against all of the respondents should be dismissed.

sgd.: EDWARD M. CURRAN, Judge."

Stasch's testimony was contradictory time and again. The cross-examination indicated that Stasch was unworthy of belief. Respondent Mullen emphatically denied that he had solicited Stasch in any manner. He testified that he received a telephone call at his office that Stasch wished to see him. The assistant Probation Officer of the Police Court testified that she frequently took calls from prisoners in the dock and transmitted them to Mullen (R. 122). Mullen's testimony was partially substantiated by the testimony of the witness McGee who informed the lower court that Stasch advised him that a cell mate had recommended Mullen. Stasch then inquired of McGee if Mullen was all right (R. 71). In view of this testimony and the other facts which will be hereinafter set forth, the Court's attention is invited to the fact that although a proceeding instituted for the purpose of depriving an attorney at law of the right to practice, is not, strictly speaking, a criminal proceeding, yet the consequences are penal in effect. The attorney quite probably will be deprived of a livelihood. He is presumed to be innocent of the charges preferred against him until the contrary appears. The committee had the burden of proof to establish the charges. The degree of proof required in disbarment proceedings is that the truth of the charges must be sustained by a clear preponderance of the evidence. Most of the authorities determined that it is not necessary that the proof be established beyond a reasonable doubt but it must be by a preponderance of the evidence. The following cases support this contention:

- In re Houghton*, 67 Cal. 511, 8 Pac. 52;
- People v. Goddard*, 11 Colo. 259, 18 Pac. 338;
- People v. Benson*, 24 Colo. 358, 51 Pac. 481;
- People v. Pendleton*, 17 Colo. 544, 30 Pac. 1041;

Shufeldt v. Barker, 56 Ill. 299;
State v. Howard, 112 Iowa, 256, 83 N. W. 975;
In re Clink, 117 Mich. 619, 76 N. W. 1;
In re Balus, 28 Mich. 507;
State v. Wines, 21 Mont. 464, 54 Pac. 562;
State v. Shumate, 48 W. Va. 359, 37 S. E. 618;
Walker v. State, 4 W. Va. 749.

In the case of *In re Disbarment Proceedings*, 321 Pa. 81, 184, Atl. 59, the Court in speaking of the degree of proof required in a disbarment case said:

"The burden rested on the committee or those in charge to prove their case by evidence *which left clear the conclusion* of unprofessional conduct prejudicial to the practice of law and subversive of their oath of office."

In re Houghton, 67 Cal. 511, 8 Pac. 52, the Court in speaking of a judgment of disbarment or suspension said:

"A judgment against the respondent deprives him of personal and property rights. Unless we are *clearly* satisfied of respondent's guilt we ought not to remove or suspend him from the practice of his profession."

In *People v. Benson*, 24 Colo. 358, 51 Pa. 481 (1897) the proceeding was to disbar an attorney for compounding a felony. The court held that the charges *must be established by clear, convincing and satisfactory evidence*.

Again in the case of *People v. Pendleton*, 17 Colo. 544, 30 Pac. 1041, the Court stated that the principle object of disbarment is to purify the legal profession but the judgment of disbarments may entail disastrous

consequences upon the individual himself. We think a judgment should only be pronounced upon *clear and convincing proofs*.

In *Shufeldt v. Barker*, 56 Ill. 299 (1870), the attorney gave or offered to give testimony which it was alleged had been communicated to him in his professional capacity and hence confidential. The court said:

"The respondent, in express terms, denies the charge exhibited against him, and to overcome this express denial there ought to be required more than a mere preponderance of the evidence. A charge so grave in its character and so fatal in its consequences, ought, certainly, to be proved by what the law denominates a clear preponderance of the evidence. Such evidence is wanting in this case. The consequences of a conviction in cases like this are most disastrous to the party accused, and no slight evidence will warrant the conviction. Even if we should hold that the party has been guilty of some slight indiscretion, it does not follow that his name ought to be stricken from the roll of attorneys. A man's profession is sometimes all his means of a livelihood. It has cost him much labor, and intense study through many weary years. It is to him valuable capital, and he should not be denied the right to exercise its duties and receive the emoluments attached thereto, except upon clear proof of willful and corrupt professional misconduct."

In the case of *State v. Cutlet*, 83 Okla. 183, 202 Pac. 782, the Court said:

"In a proceeding to disbar an attorney at law, such attorney is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the Court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment to disbar.

The Court's attention is invited to 6 *Corpus Juris*, 606, Sec. 75, wherein it is recited:

"In proceedings for the suspension or the disbarment of an attorney he is presumed to be innocent of the charges preferred and to have performed his duty in accordance with his oath."

In re Haymond, 121 Cal. 385, 53 P. 899;

In re Parsons, 35 Mont. 478, 90 P. 163;

In re Wellcome, 23 Mont. 450, 59 P. 445;

In re Newby, 76 Nebr. 235, 117 N. W. 691;

Ex. P. Gadsden, 89 S. C. 352, 71 S. E. 952.

A contrary view has been expressed.

The case of *In re Reily* (Oklahoma Supreme Court—1919) 183 Pac. 728, 7 A. L. R. p. 89, was a proceeding to disbar Reily on the grounds that he was guilty of embezzlement. The respondent explained the transaction and stated that the money was loaned to him by the client and had been paid back. The court said:

"The serious consequences of disbarment should follow only where there is a clear preponderance of evidence against the respondent. In such proceeding the attorney sought to be disbarred is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment. *Re Sitton*, Okla. 177, Pac. 55; *Re Parsons*, 35 Mont. 478, 90 Pac. 163; *People ex rel Healy v. Thornton*, 228 Ill. 42, 81 N. E. 793; *Re Newby*, 82 Neb. 235, 117 N. W. 691; In the case of *People ex rel Shufeldt v. Barker*, 56 Ill. 299, it was said: 'A charge so grave in its character, and so fatal in its consequences, ought certainly to be proved by what the law denominates a *clear preponderance of the evidence*.'

* * * * *

"In the case of *Re Newby* (1908), 82 Neb. 235, 117 N. W. 691, a proceeding for disbarment, an attorney was charged with impersonating a deceased person, forging the name of the deceased person, and assuming to appear for him. The court said: 'While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession, and his reputation as an honest and honorable man, the presumption of innocence applies, and his culpability must be established by at least a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true * * * We can not say that we are satisfied from the evidence that he is innocent of the charges made against him, nor can we say that we are satisfied to a reasonable certainty of his guilt. The mind of the court being in this condition, it is our duty to give Mr. Newby the benefit of the doubt, and to hold that the charges have not been sustained by the evidence to such an extent as to warrant the infliction of the severe penalty that must inevitably have followed had we been fully satisfied of his guilt.'"

The Court's attention is respectfully invited to a rather lengthy annotation contained in 105 A. L. R., beginning at page 984. It seems to be that the degree of proof required of attorney's misconduct in proceedings for disbarment is divided into several classes. Arkansas, Florida, Indiana, Kansas, Kentucky, Massachusetts, Missouri, New York, New Mexico, Oklahoma, Texas, Washington and Wisconsin proceed on the theory that a *preponderance* or a *fair preponderance* of the evidence is all that is required to support disbarment charges of a non-criminal matter. The authorities are contained in the annotation.

In Colorado, Iowa, Illinois, Kansas, Mississippi,

Nebraska, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Virginia, West Virginia, Wisconsin and Canada the authorities, which are also contained in the annotation, hold that a *clear preponderance* of the evidence is necessary on the ground that a disbarment proceeding itself is civil and the charges are not of a criminal character. In numerous other cases reported on *Page 986, 105 A. L. R.*, the annotator states that the test of *clear and satisfactory proof* is necessary to disbar. Cases are cited from California, Hawaii, Illinois, Iowa, Kansas, New York, Pennsylvania and Wisconsin.

It must be the rule that at least a preponderance of the evidence is necessary in order to convict a lawyer of conduct which will warrant his suspension or disbarment. In the instant case the proof was so frail, incredible and unworthy of belief that the court should have dismissed the charges as indicated in the dissenting opinion of Judge Curran, *supra*. We believe the respondent's evidence preponderated in favor of acquittal.

We now examine the facts to see if our contentions are well founded.

On cross-examination Stasch could not recall the time or the day on which he was arrested. He stated that he had only two bottles of beer to drink which was four or five hours prior to the time of the accident and the arrest (R. 28). And yet, the officer testified that he was so drunk at the time of the arrest that he called the patrol wagon to take Stasch to the station (R. 3). Stasch testified that he could stand up all right, talk all right and needed no help. Stasch did not know why he was arrested (R. 29). Yet the testimony of the officer disclosed that he was pretty drunk (R. 3). He stated the officer merely took him down to the sta-

tion (R. 29). He further testified that the officer did not ask him for his driver's permit nor for his registration card at the time of the arrest and yet he was charged with those violations. He stated (R. 29) that he did not know what the nature of any of the charges against him were until the respondent Mullen told him. He denied that he discussed with Mr. McGee the qualifications of Mr. Mullen as an attorney (R. 30). McGee had testified that he had done so (R. 71). He stated that when he was leaving the office of the bondsman he walked downstairs with three men. He thought he was walking with McGee but he could not swear that it was McGee. He was then asked:

"Q. Who walked with you?

"A. I think it was McGee, I could not swear it was him.

"Q. Did you walk with Mr. McGee at all?

"A. No, sir. I walked downstairs—we all walked downstairs together.

* * * * *

"Q. Just listen to my question, will you? Were you walking down the stairs with Mr. McGee when you started downstairs to get in the automobiles?

"A. I was walking with Mr. McGee."

He denied that he asked Mr. McGee if Mullen was all right. He denied that he told McGee that a drunk in the cell block had referred him to Mr. Mullen (R. 31). He could give no reason how Mullen knew that his name was Hans Stasch (R. 32). He stated that Mullen just asked him if he was Hans Stasch and then walked away (R. 32). Stasch then gave a preposterous statement as to how he was approached by Mullen. The first time Mullen came up, he asked him if he was Hans Stasch, to which Stasch replied, "Yes, sir." He then left, came back and said, "How about defending

you? ” (R. 33.) Mullen then asked him if he had any money and he replied he did not (R. 34). Notwithstanding this statement of lack of funds the witness then stated Mullen said, “How about defending you? Can you get any money?” Stasch replied he did not know whether he could or not. Stasch testified that he never advised Mullen the reason for his incarceration for the reason that he, Stasch, did not know. Mullen told him why he was arrested (R. 34). The witness *stated that he advised Mullen he did not know if there was a chance of him getting any money.* He could not recall what Mullen said to him at that time. Mullen returned again and said, “*How about me representing you any way?*” and continued, “If I can get you out will you pay me?” To which the witness replied, “I will try to.” (R. 35.) He stated that nothing was said about money by Mullen until after he had been released on bond and was going from the Police Court to the bondsman’s office (R. 35). He could not recall the number of times that Mullen had approached him to represent him (R. 35). He said Mullen would come up to him and talk to him for awhile, then go back. He did this five or six times (R. 35). He could not recall that he was questioned by the clerk of the court (R. 36). The Court will take judicial notice that the clerk of the court always asks the defendant how he wishes to plead to the information. He could recall distinctly what had happened at Mr. Beach’s house on the day he was released, but could not recall what had happened in the court room (R. 37). He said he did not know when he was arraigned that he was charged with driving while under the influence of liquor (R. 37). He could not recall a single thing that he said to the Judge or the Court (R. 37). He did not remember Mullen requesting that bond be fixed by the Court and stated that

Mullen advised him to go downstairs, saying, "I will fix it up for you" (R. 37). It is observed that in this instance the bond is always set by the Court at the time the prisoner is arraigned. He denied that he had been convicted of driving while drunk in Maryland. Thereupon the following occurred:

"Q. Haven't you ever been convicted of driving while drunk in Maryland?

"A. Oh, no.

"Q. Were you convicted before a Justice of the Peace?

"A. Yes. No, sir. I was just convicted before a judge." (R. 38.)

He denied that he had even been arrested in the District of Columbia (R. 39). He did not know that he was arrested in 1934. He was asked if he was arrested in the District of Columbia in 1932 for the illegal possession of liquor to which he replied: "he could not say, he could not recall." He was then asked if Mr. Whelan didn't represent him in 1932 for the illegal possession of liquor, to which he replied, "Well, I will say, yes." When asked what was the trouble he said, "They had me charged with transporting, possession of illegal whiskey" (R. 39). This happened in Washington, D. C. (R. 40). The Court's attention is respectfully invited to the cross-examination of the witness set forth on page 40. He was then shown exhibits one and two which were his bond to the court on which his signature appeared. He did not know where he signed these instruments (R. 42). It will be observed that these bonds had been executed in the office of the clerk. At the time he took the oath on bond he did not know what the clerk said. The witness further testified that Mr. McGee did not, in his presence, say

that he, McGee, was stuck for \$25.00 (R. 53). Again we invite the attention of the Court to the fact that both Mullen and McGee testified that this statement was made (R. 71, 100). The witness testified that when he visited Mullen's office he would talk about his case (R. 56). And yet on direct examination he testified that Mullen never did anything to prepare for trial (R. 26). He denied that he advised Mullen that he had been convicted in Maryland for driving while drunk (R. 56). After hesitation he finally admitted that he did advise Mullen (R. 57). The witness denied that he was operating the automobile under the influence of liquor at the time of his arrest. He did not know the address of his companion on the day in question and knew him only as Valentine (R. 69).

Respondent Mullen denied that he solicited Stasch (R. 96-97) and stated that he was called by phone to see Stasch. The telephone call was made by one of the assistant probation officers of the Police Court (R. 105). He got an interview slip from the presiding Judge (R. 108). It is the practice in Police Court to get permission from the Court before a prisoner can be interviewed.

McGee testified that Stasch informed him that some one in the dock had recommended Mullen and Stasch inquired of him if Mullen was all right (R. 71).

Mable Bouscaren, an assistant probation officer at Police Court, testified that she frequently called Mullen at the request of prisoners (R. 122).

Many witnesses testified as to the favorable reputation the respondent Mullen enjoyed for honesty, integrity, truth and veracity (R. 91 to 96 inclusive). Counsel for the committee stipulated that Frank J. Hogan, the President of the American Bar Association and former President of the District bar, would, if

called, testify to Mullen's good reputation for truth, veracity, honesty and integrity.

It is needless to cite authorities to this Court that character testimony, even of itself, when taken into consideration with the other facts in the case, is sufficient to create a doubt as to the guilt of a party. It is true that this law is usually considered in criminal cases, but the effect of conviction of Mullen in this case is penal in its consequences and destroys the fruits of a lifetime of honest endeavor in the Court. The penalty is at least semi-penal. We believe that the evidence produced against Mullen was so frail, incredible and unworthy of belief, that standing alone in the face of the direct denial by the respondent Mullen the complaint against him should have been dismissed by the Court.

CONCLUSION.

It is respectfully submitted that the case should be reversed on the grounds hereinbefore outlined.

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FILED DEC 15 1968

IN THE

Joseph W. Stewart

CLERK

**United States Court of Appeals for
the District of Columbia**

—
No. 7182
—

JOHN P. MULLEN, *Petitioner,*

v.

AUSTIN F. CANFIELD, et al., *Respondents.*

—
BRIEF ON BEHALF OF RESPONDENTS
—

AUSTIN F. CANFIELD,
WILLIAM A. GALLAGHER,
GEORGE E. MONK,
FRANKLYN A. YASMER.

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BRIEF ON BEHALF OF RESPONDENTS

The respondents, all members of the Bar of The District Court of the United States for the District of Columbia and members of the Bar Association of the District of Columbia, were appointed as a committee of that Association to investigate complaints and grievances alleged to have been committed by various attorneys in and before the Police Court of the District of Columbia. On, to wit, October 13, 1937, at a duly called meeting of the Judges, they were duly appointed as a Committee on Grievances of the Police Court of the District of Columbia (T. 6 et seq.), in accordance with the rules of the Police Court of the District of Columbia promulgated August 5, 1927, and effective

October 3, 1927. The respondents will refer to themselves herein as "The Committee."

On December 14, 1937, the Committee instituted proceedings against the petitioner herein in accordance with the directions of the Police Court as shown by the minutes of the meeting of the Judges of that Court on December 9, 1937. (T. 6 et seq.) At the same time and again by directions of the Court, proceedings were also instituted against Hyman Mendelson and Joseph P. McGee, professional bondsmen engaged in the bonding business in the District of Columbia. By agreement of counsel, all three proceedings were consolidated for trial and determination, and the same came on for trial before the entire bench of the Police Court of the District of Columbia on December 21, 1937. The Committee proceeded in the usual method to present the facts learned by virtue of their investigation. The respondents all appearing by counsel, proceeded to put on their defense, after which the matters were taken under advisement by the Court and on, to wit, the 8th day of January, 1938, the Court announced that it had arrived at a verdict and, thereupon announced by unanimous decision the charges against the said Mendelson and the said McGee should be dismissed; the Court also announced that by a majority vote, Judges McMahon, Casey, and Newman concurring, that the petitioner, Mullen, was found guilty of making solicitations for a professional retainer from one Hans Otto Stasch, all in violation of the rules of the Police Court of the District of Columbia, and that he was guilty of professional misconduct prejudicial to the administration of justice in so doing. It was also announced that the Judges unanimously voted to dismiss the other charges against petitioner. On the 29th of January, 1938, the Court signed an order recording its verdict and decision and fixed the penalty to be suffered by Mr. Mullen as a suspension for a

period of six months from that date from practicing as an attorney or counsellor before that Court. The majority of the Court did not file any written opinion, Judge McMahon speaking for the majority simply announced the verdict and decision of the Court. Judge Curran filed a written dissent, whereupon the petition for Writ of Error was filed with this Court and in accordance with the rules of the Police Court, petitioner tendered his Bill of Exceptions, which the Committee moved to strike on the ground that it was violating the rules of this Court. That motion was overruled by the Police Court and ultimately petitioner was allowed his Writ of Error by this Court.

Because the Bill of Exceptions sets out most of the testimony *in extenso*, we shall not attempt to recite any narrative thereof. The Statement of Facts contained in petitioner's brief is in no wise complete.

ASSIGNMENT OF ERRORS

Petitioner in his brief does not set out the assignment of errors; however, the errors assigned are discussed in petitioner's brief under three points. In replying to the argument of petitioner's counsel, we shall take up the points in the same chronological order as they are discussed in his brief.

POINT ONE

The Committee respectfully calls to the attention of the Court that at no time did it seek the disbarment of petitioner. The following is contained in the prayer of the Committee's petition "* * *" requiring him to answer these charges under oath, and that the said John P. Mullen be duly tried upon the issues made by said charges and his answer thereto, and that if found by the Court to be guilty thereof, *the Court administer*

such punishment in the premises as it shall consider meet and proper." (Italics ours) Again may we call the Court's attention to the rule itself which was issued by the Court and served upon petitioner and from which the following is taken " * * * and show cause why he should not be held in contempt of this Court or why he should not be suspended from further practicing before the Bar of this Court." We agree with counsel for petitioner that any proceedings looking towards the disbarment of petitioner must be had in the District Court, there to be handled by the Committee on Admissions and Grievances of that Court, all in accordance with the Statute made and provided and the rules of the District Court.

T. 18, Ch. 4, Sec. 155, gives the Police Court power "to make such rules and regulations as may be deemed necessary and proper for conducting business in said Court." The rules of the Police Court contain the following:

"SUSPENSION AND REMOVAL OF ATTORNEYS.

1. Dishonesty, misconduct in office, conviction of crime involving moral turpitude, unprofessional conduct involving moral turpitude, the unprofessional solicitation or procurement of services in any case in this Court, suspension or removal from practice before the Supreme Court of the District of Columbia, shall be cause for the suspension or removing of any attorney from practice before this Court.

2. COMMITTEE ON GRIEVANCES.—Whenever complaint in writing shall be presented to the court charging a member of the bar of the Court with any of the causes for suspension or removal, and setting forth the facts upon which the accusation is grounded, such complaint shall be forthwith referred to a committee of three members of the bar of the Court to be appointed by the Court, and it shall be the duty of the said Com-

mittee forthwith to investigate such complaint and to report thereon to the Court, stating whether the committee deems the facts as ascertained by them to be sufficient to support complaint or deem it proper upon such facts that the member so charged should be called upon to answer.

3. CHARGES AND NOTICES.—In the latter event a charge shall be formulated by the committee and submitted with such report, and if the court shall so order, shall be filed with the clerk of the court, whereupon the following proceedings shall be had: A copy of the charges certified by the Court with a notification of the hearing and time thereof to be designated thereon, shall be served upon said member, and at such time so fixed the Court will proceed to hear and determine the same, said copy to be served five days before said day so fixed, by the marshal or otherwise as the Court may direct. Said committee, by one or more of its members, shall present and prosecute such charge and the same shall be tried by the Judges of the Court.

At all hearings subsequent to the filing of charges the respondent shall be entitled to be present in person and to be heard in his own behalf or by counsel, and, upon the trial, to present evidence in his defense.

If upon trial the court shall find the respondent guilty of the charge, he may be suspended from practice before the court during such time as the Court may deem proper. Nothing herein shall be construed to deprive the Court of power, upon its own initiative, to direct the preferring of charges against a member of the bar and the trial thereof, or of the power to appoint prosecutors to present and prosecute the same, or to deprive the Court of any other power in the premises which it may possess."

With this rule before us and upon the authority of United States ex rel, *Alward v. Latimer*, 44 App. D. C. 81, the Committee proceeded to institute these charges. Petitioner in his brief states that the case of *Alward v.*

Latimer cannot be used as an authority in this case for the reason that in the Alward case petitioner was charged with contempt of Court as well as with unprofessional conduct in the Juvenile Court. In the instant case, the rule was issued in the alternative, either to hold petitioner in contempt, or, to *suspend him* in accordance with the rule, *supra*. Petitioner makes the very same attack here as was made in the Alward case. An examination of the transcript of record and the briefs filed in this Court in the Alward Case #2812 indicates this fact.

In the statement of facts printed in the decision of this Court (44 App. D. C. 83) it appears that the Court took cognizance of that fact.

The case of *In re Adrians*, 17 App. D. C. 39, set out by petitioner in his brief, in our opinion points out clearly the right of a Court to discipline the members of its Bar and inflict appropriate penalties for violation of the rules of good professional conduct. In that case it appears that the proceedings for *disbarment* were commenced in this very Court upon information filed by the then United States Attorney for the District of Columbia, and this Court exercising its power to discipline and punish attorneys, quickly disbarred the respondent.

Thus, we say unless this Court sees fit to overrule the case of *Alward v. Latimer*, or, should hold that the Police Court of the District of Columbia, even though an inferior Court, is without power to discipline and punish members of the Bar of that Court when guilty of infractions of the rules of good professional conduct, we need not look outside this jurisdiction for any authority on the subject matter and we contend that point one of petitioner is therefore without merit.

POINT TWO

Counsel's second point is based on the theory that one act or solicitation by an attorney is not sufficient misconduct to suspend or disbar that attorney. It is our contention that solicitation in any form, even though an isolated case, if the solicitation is such as to violate the rules of good professional conduct or the professional canons of ethics, is sufficient to invite discipline by the Court. The Police Court in passing its rule, *supra*, declared solicitation to be an offense and it did not, in its rule, limit it to one overt act. Solicitation is distinctly recognized as an offense by the Courts. In a case decided in 1934, in the case of *In re Ades*, 6 F. Supp. 465 (opinion by Soper, Circuit Judge) the following appears:

“The canons of professional ethics of the American Bar Association and the decision of the Courts quite generally prohibit the direct solicitation of business for gain by an attorney either through advertisement or personal communication; * * *”

In the case of *In re Cohen*, a Massachusetts case decided in 1928, and reported in 159 N. E. 495, 55 A.L.R. 1309, Mr. Chief Justice Rugg of the Massachusetts Supreme Judicial Court discusses soliciting by advertisement. In a learned opinion the Chief Justice ably points out the inherent jurisdiction with which a Court is clothed to discipline and punish attorneys for professional misconduct.

Volume 7, C.J.S., Page 758, contains the following:

“Under the rule that professional misconduct renders an attorney subject to disciplinary action, various acts of misconduct have been held to authorize suspension or disbarment such as * * * soliciting business in an unprofessional manner * * *.”

A rather interesting discussion of the inherent rights of Courts to discipline attorneys is set out in the opinion of *In re Greathouse*, 189 Minn. 51, 248 N.W. 735.

POINT THREE

The third point upon which counsel bases error is that the evidence was lacking in sufficiency and credibility. The Court will recall that this case was tried before the four Judges. Witnesses were examined and cross-examined by counsel as well as by members of the Court. The Court had ample opportunity to observe the conduct, the demeanor, the attitude and the bias of all of the parties and witnesses to the case. Much is said about the unreliability of the testimony of Stasch. It is our contention that Stasch was a man of a low degree of intelligence, just the kind who could easily be importuned or deceived by someone who was in a position to take advantage of him. Petitioner testified in his own defense. His testimony was roundly impeached by disinterested witnesses. (See testimony Grace Beach, Edward Stanley Beach, Linwood J. Ney, T. 128 et seq.) It then became a matter for the Court below to weigh all of the evidence, giving sufficient weight to all of the testimony as it touched each of the charges made. Their decision being a decision of fact and decided by a majority vote should not be disturbed here on the question of incredibility of evidence. The matter of incredibility was for the Court below to determine. We believe that if the preponderance of evidence rule was applied below, that this rule is the correct rule by the great weight of authority. An interesting decision on the quantum of evidence is found in the Massachusetts case of *In re Mayberry* reported at 3 N.E. (2nd) 248 and 105 A.L.R. 976. The annotation following this case sets out a large collection of authorities on this question.

CONCLUSION

In conclusion we respectfully urge that the verdict and judgment of the Court below should be affirmed.

Respectfully submitted,

AUSTIN F. CANFIELD,

WILLIAM A. GALLAGHER,

GEORGE E. MONK,

FRANKLYN A. YASMER.